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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 24,
Petitioner,

v.

DENNIS W. SCHOONOVER,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Sixth Circuit majority apply a negligence standard incompatible with decisions of this Court and other Courts of Appeals in sustaining a union's liability for breach of the duty of fair representation based on the union's failure to retain an expert witness and other perceived "mistakes" in handling a member's grievance?

2. Did the Sixth Circuit majority apply a standard incompatible with decisions of this Court in sustaining union liability for a breach of the duty of fair representation based on a determination that it was merely "conceivable" that different measures by the union would have produced a result favorable to the grievant in the arbitration proceeding?

LIST OF PARTIES

In additon to the parties listed in the caption, the parties in this action include Consolidated Freightways Corporation.

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No. ———

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 24,
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DENNIS W. SCHOONOVER,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Local 24 of the International Brotherhood of Teamsters, respectfully prays that a writ of certiorari issue to review a judgment and opinion of a divided panel of the United States Court of Appeals for the Sixth Circuit.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, rendered on June 19, 1998, is reported at 147 F.3d 492 (6th Cir. 1998). Appendix A (A. 1a-12a). Petitions for rehearing and suggestions for rehearing *en banc* by Petitioner Local 24 and Consolidated

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[1] The case was decided by opinion of Circuit Judge Merritt for a majority composed of himself and Circuit Judge Boggs over the dissenting opinion of Circuit Judge Kennedy.

were denied August 7, 1998. Appendix B (A. 13a-14a). The opinion of the United States District Court for the Northern District of Ohio denying Local 24's and Consolidated's post-verdict motions for judgment is unpublished. Appendix C (A. 15a-17a).

JURISDICTION

The district court had jurisdiction of this action pursuant to 29 U.S.C. § 185(c) and 28 U.S.C. § 1337. Final judgment was entered by the district court on February 26, 1996. Motions by Local 24 and by Consolidated for judgment as a matter of law were denied by the district court on May 3, 1996. Local 24 and Consolidated appealed pursuant to 28 U.S.C. § 1291. The Court of Appeals issued its decision and filed its opinion on June 19, 1998. Local 24 and Consolidated filed timely petitions for rehearing and suggestions of rehearing *en banc* which were denied on August 7, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 301(a) of the Labor-Management Relations Act of 1947 provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

STATEMENT OF THE CASE

This is a hybrid suit under § 301 of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185, and the statutory duty of fair representation

("DFR"). Respondent Dennis W. Schoonover claimed (1) that Consolidated Freightways Corporation ("Consolidated") wrongfully discharged him in violation of its collective bargaining agreement, and (2) that Petitioner, Local 24 of the International Brotherhood of Teamsters, violated its duty of fair representation ("DFR") by mishandling his ensuing grievance before a Joint Arbitration Panel, primarily through the union's tactical decision not to retain an expert witness.

The district court entered judgment against Local 24 and Consolidated on a jury verdict in the amount of $850,000. Applying legal standards incompatible with decisions of this Court and other courts of appeals, the Sixth Circuit affirmed. The Sixth Circuit majority determined that, in handling Schoonover's grievance, Local 24 made "mistakes"—first and foremost, its tactical judgment not to retain an expert—but for which it was "certainly conceivable" that the Joint Arbitration Panel would have upheld Schoonover's grievance. A. 7a.

As explained below, the case presents significant issues regarding both the proper scope of the duty of fair representation—particularly whether a tactical decision not to use an expert at a grievance hearing may be held to violate the duty—and the conditions under which breach of the DFR may be held to have tainted the arbitration process so as to defeat the finality of the arbitration result.

This Court has held that a union may be found to have breached its duty of fair representation "only when [its] conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 191 (1967). Unlike most others cases where DFR liability has been sustained, the record here contains no history of past differences between the union and Schoonover, and no hint of animosity towards him on the part of any union official. The Sixth Circuit majority's decision suggests no evidence of discrimination or bad faith by Local 24. Rather, the Sixth Circuit ma-

jority reasoned that Local 24's "mistakes" in handling Schoonover's grievance supported a finding that its representation had been "arbitrary", and hence violative of the DFR. What is especially unusual about this case is the Sixth Circuit majority's view that the union's tactical judgment not to retain an expert could be a basis for DFR liability.

In discharging Schoonover, Consolidated claimed that he intentionally broke the brake pedal of his assigned truck after displaying angry dissatisfaction with the condition in which it was provided to him for an extended over-the-road haul. A. 2a. As described by the Sixth Circuit majority, Consolidated suspected that Schoonover broke the pedal, using an extended tire iron, known in the industry as a "bud bar", which was present in the truck. A. 2a. Consolidated obtained a metallurgist's report, which it provided to the union upon discharging Schoonover and which it later submitted to the Joint Arbitration Panel. The report concluded that the pedal was fractured by application of an upward bending force exerted from beneath the pedal which, according to Consolidated, supported the company's suspicion. A. 3a. Before the Joint Arbitration Panel, Local 24 *inter alia* presented Schoonover's testimony that he had not broken the pedal and that it had instead broken spontaneously. However, the Joint Arbitration Panel voted unanimously to sustain Schoonover's discharge. A. 3a.

Central to Schoonover's DFR claim was his contention that Local 24 should have obtained the broken pedal pieces from Consolidated and had them examined by an independent expert in order to obtain an independent opinion. The Sixth Circuit majority found evidence supporting a finding that failure to retain an expert was a mistake. As observed by Judge Kennedy, however, the evidence was also undisputed that Local 24 made a tactical judgment not to retain an expert based on past negative experiences with experts and the fact that the union "could not secretly examine the pedal." A. 10a. More-

over, the evidence was undisputed that Local 24's officials made the judgment that Consolidated's metallurgical report would not fulfill its burden of proving that Schoonover intentionally broke the pedal. A. 10a.

The Sixth Circuit majority recognized that a team of Local 24 representatives, investigating the incident, had tried without success to replicate the fracture based on Schoonover's claim that the pedal could have broken due to pressure exerted from beneath the pedal by a "tie down device". A. 3a, 11a. As described by the Sixth Circuit majority, a Consolidated supervisor, Joe Sarne, then showed the union representatives how a pedal could be easily broken using a bud bar as the company claimed had occurred. A. 5a, 11a.

In addition to asserting that Local 24 should have engaged an expert, Schoonover claimed that Local 24 should also have attempted to replicate Sarne's demonstration; should have brought an actual truck to the arbitration hearing; and should have further investigated several brake pedal incidents involving Freightliner trucks which were produced by a different manufacturer than the International truck driven by Schoonover. A. 5a-6a.

Affirming the judgment of the district court, the Sixth Circuit perceived evidence that Local 24 made certain "mistakes" in its handling of Schoonover's grievance—first and foremost its decision not to present an expert. Writing for the majority, Judge Merritt determined that the jury permissibly found that Local 24 breached its DFR through these "mistakes" in handling Schoonover's grievance:

> Refusing to call a metallurgist, when the union representatives knew such testimony was crucial; failing to investigate similar incidents involving broken pedals, when that evidence could have convinced the arbitrators that Schoonover's incident was not as unsual as it appeared; crediting Consolidated's re-

> enactment of the incident, when an independent investigation would have revealed that Schoonover could not have broken the pedal with only a bud bar in the short time he was gone from the terminal; and neglecting to bring a truck to the hearing, when its presence would have allowed the grievance committee to test the company's version of the facts for themselves, are all substantial reasons which in combination, would justify the jury's finding that the union's representation of Schoonover was "arbitrary, discriminatory, perfunctory, or in bad faith."

A. 7a. Upholding the finding that Local 24's mistakes tainted the arbitration process, Judge Merritt declared:

> Without these *mistakes,* it is *certainly conceivable* that the grievance committee would have decided Schoonover's grievance differently.

A. 7a. (Emphasis added).

Judge Kennedy wrote in dissent:

> The majority finds that without the mistakes which the union representatives made, the jury could find that the grievance committee would have decided Schoonover's grievance differently. If the Union were held to a negligence standard, I would agree. But union representatives are not lawyers. They do not have the advantage of discovery procedures. At most, the Union's failures were negligence or bad judgment, neither of which is enough to constitute the breach of duty of fair representation.

A. 10a. On this basis, Judge Kennedy concluded that the Sixth Circuit majority's affirmance of the judgment for Schoonover conflicted with decisions of this Court which hold that negligence by a union cannot support liability for breach of the duty of fair representation. A. 9a, 10a.

REASONS FOR GRANTING THE WRIT

I. UPHOLDING LIABILITY OF A UNION BASED ON "MISTAKES" IN GRIEVANCE HANDLING IS CONTRARY TO DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS IN THAT IT APPLIES A LEGAL MALPRACTICE STANDARD OF NEGLIGENCE TO DETERMINING DFR VIOLATIONS

A. Application of a Negligence Standard Is Contrary to Decisions of This Court and Other Courts of Appeals

In affirming the liability of Local 24 for a breach of the DFR based on perceived "mistakes" in its handling Schoonover's grievance, the Sixth Circuit applied what amounts to a legal malpractice standard of negligence. Such a standard is incompatible with decisions of this Court and other courts of appeals.

Pervading this Court's decisions applying the DFR has been a recurring emphasis that the duty, while a necessary check on union power, is a *limited* one. This Court has emphasized that, to effectively carry out its assigned responsibilities under federal labor law, a union must be allowed a "wide range of reasonableness" in its representation of the bargaining unit as a whole. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). To that end, this Court declared in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976), that "[a] union is not liable for errors in judgment if they were made honestly and in good faith."

In *United Steelworkers v. Rawson*, 495 U.S. 362 (1990), this Court held squarely that mere negligence by the union cannot support DFR liability. This Court explained that the DFR, while an important check on arbitrary exercises of union power, is a "purposely limited check". *Id.* at 374. In *Airline Pilots v. O'Neill*, 499 U.S. 65, 78 (1991), this Court held that union behavior may

be disapproved as "arbitrary" only if it is so "wholly irrational" as to be outside the wide range of reasonableness prescribed by *Ford Motor Company*. 499 U.S. at 78. The Sixth Circuit's decision affirming DFR liability based on perceived "mistakes" is fundamentally at odds with *Ford Motor Co., Rawson* and *O'Neill*.

Application of what amounts to a legal malpractice standard for determining DFR liability also conflicts irreconcilably with decisions of other courts of appeals. For example, in *Peterson v. Kennedy*, 771 F.2d 1244, 1254 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986), the Ninth Circuit distinguished the standard for DFR from that for legal malpractice. The Ninth Circuit declared that it had:

> never held that a union . . . acted in an arbitrary manner where the challenged conduct involved the union's judgment as to how best to handle a grievance.

Id. at 1254. Contrary to the Sixth Circuit majority, the Ninth Circuit held that a union's conduct may not be deemed arbitrary:

> simply because of an *error* in evaluating the merits of a grievance, in interpreting particular provisions of a collective bargaining agreement, or *in presenting the grievance at an arbitration hearing.*

Id. (Emphasis added).

The Sixth Circuit majority in this case failed to pay so much as lip-service to this Court's pain-staking distinction between negligence by the union and conduct which is "so wholly irrational" as to permissibly support DFR liability. At no point did the Sixth Circuit majority even attempt to distinguish the "mistakes" it perceived from simple negligence. As emphasized by Judge Kennedy, the majority's conclusion that the record revealed "mistakes" in Local 24's handling of Schoonover's grievance reflects that the court in actuality applied a "negligence" standard in sustaining Local 24's liability.

This Court has not had occasion since its decision in *O'Neill* in 1991 to review the manner in which lower courts are applying the DFR so as to assure that unions are in fact afforded the wide range of reasonableness which the Court has prescribed. The Sixth Circuit majority's application of a legal malpractice standard to sustain DFR liability of Local 24 is incompatible with decisions of this Court and other courts of appeals and fully warrants this Court's review.

B. Assigning DFR Liability for a Union's Failure to Retain an Expert Is Contrary to Decisions of Other Courts of Appeals

The specific question of whether a union's tactical decision not to retain an expert can support DFR liability, absent evidence of discrimination or bad faith, has not been considered by this Court. The question has been addressed in several court of appeals decisions. The Sixth Circuit majority's decision for the first time sustains DFR liability based on a union's tactical decision not to retain and present an expert witness in a grievance arbitration.

The Sixth Circuit majority's decision conflicts in this respect with recent decisions of the Eighth and Ninth Circuits in *Smith v. United Parcel Service, Inc.*, 96 F.3d 1066 (8th Cir. 1996), and *Patterson v. Teamsters Local 959*, 121 F.3d 1345 (9th Cir. 1997). Contrary to the decision of the Sixth Circuit majority, those decisions underscore the discretionary nature of the unions' decision whether or not to use an expert in support of a member's grievance.

In *Patterson*, the plaintiff claimed that the union breached its DFR *inter alia* by failing to present expert, medical evidence in support of his grievance. As occurred here, the union responded that it had made a strategic decision not to present such evidence based *inter alia* on concern that it "could have had an adverse effect on the arbitrator's view of [the plaintiff's] job performance."

Id. at 1349. The Ninth Circuit held that a union's "reasoned tactical decision not to present . . . medical evidence does not amount to a breach of the duty of fair representation." *Id.* at 1350.[2] Similarly, the Eighth Circuit in *Smith* declared that the decision whether to procure an expert witness "is a matter within the wide range of reasonableness afforded a union" in pursuing grievances on behalf of its members. 96 F.3d at 1069.[3]

A tactical decision not to use an expert cannot be found so "wholly irrational" as to support DFR liability consistent with *Rawson* and *O'Neill*.

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[2] Circuit Judge Noonan dissented from the Ninth Circuit's decision upholding summary judgment for the defendant union in *Patterson*, perceiving factual dispute over whether the union's decision not to present medical evidence was actually strategic. *Id.* at 1351. The Sixth Circuit majority, however, points to no evidence disputing the strategic character of Local 24's decision not to obtain an independent expert opinion. Schoonover introduced no evidence contesting the explanation provided in the testimony of Local 24's officers that their past experience with experts head been negative and that they were concerned that a second expert might support the opinion of Consolidated's expert. A. 10a.

[3] The Sixth Circuit itself held previously that a union's decision not to call an expert is "a discretionary decision for which [the union] cannot be found liable absent a bad or discriminatory purpose." *Walk v. P*I*E Nationwide, Inc.*, 958 F.2d 1323, 1329 (6th Cir. 1992).

Ironically, in *Woodruff v. Tomlin*, 616 F.2d 924, 930 (6th Cir. 1980) (*en banc*), the Sixth Circuit declared that *even lawyers* must be given broad discretion to make professional judgments, free from the chilling effect of being second-guessed and may not be held liable "based on an honest exercise of professional judgment." *See* G. Hazard & W. Hodes, *The Law of Lawyering*, § 1.1:201-1 (1998 Supp.). On the specific question relating to use of experts, the Sixth Circuit declared: "[i]n the absence of bad faith, . . . failure to consult an expert *cannot* be the basis of liability" for legal malpractice. 616 F.2d at 932.

II. HOLDING AN ARBITRATION PROCESS TO HAVE BEEN TAINTED BASED ON EVIDENCE THAT DIFFERENT MEASURES BY THE UNION WOULD "CONCEIVABLY" HAVE CHANGED THE OUTCOME IN FAVOR OF THE GRIEVANT IS CONTRARY TO DECISIONS OF THIS COURT WHICH UPHOLD THE FINALITY OF THE ARBITRATION EXCEPT WHERE IT IS SHOWN THAT A BREACH OF DFR ACTUALLY HAD A SUBSTANTIAL IMPACT ON THE GRIEVANCE PROCEEDING

The Sixth Circuit majority's decision conflicts with the rigorous standard established by decisions of this Court for determining whether a grievance proceeding was tainted by a union's breach of the DFR. This Court has stated that "the impact of the Union's breach on the outcome of the grievance proceeding must have been substantial," and that a plaintiff "must meet the onerous burden of proving that the grievance process was 'seriously flawed by the Union's breach of its duty.' " *United Parcel Service v. Mitchell*, 451 U.S. 56, 61 (1981); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976). Unless this rigorous standard is satisfied, the arbitration outcome is final so as to bar a collateral claim of violation of the collective bargaining agreement.

The Sixth Circuit majority's ruling on the question of taint is in direct conflict with the standard established by this Court. The Sixth Circuit majority enunciated a lesser standard for taint by stating that, without Local 24's "mistakes":

> it is *certainly conceivable* that the grievance committee would have decided Schoonover's grievance differently.

A. 7a. (Emphasis added.)

Proof that a different result would be "conceivable"—or even "certainly conceivable"—is a far cry from the requisite proof that the impact of the union's breach was

shown in fact to have been substantial. The relaxed standard applied in this case allows DFR plaintiffs to substitute speculation as to what is *conceivable* for the rigorous proof that taint *actually occurred* which has heretofore been required by decisions of this Court.

III. THE SIXTH CIRCUIT MAJORITY'S DECISION WILL INVITE A MULTITUDE OF DFR CHALLENGES BY LOSING GRIEVANTS TO UNION TACTICAL JUDGMENTS AND SUBSTANTIALLY UNDERMINE THE FINALITY AND UTILITY OF ARBITRATION

The panel majority's decision largely undoes this Court's painstaking efforts in *Rawson* and *O'Neill* to establish rules which in actuality afford unions a "wide range of reasonableness" in carrying out their representational responsibilities. Nowhere is this assurance more vital to successful collective bargaining than in connection with the myriad of difficult tactical judgments which are necessarily made by unions in the process of grievance handling. Local 24's performance could equally have been criticized had the tactical judgments suggested by the panel majority, *e.g.* to obtain an independent expert opinion or to bring an actual truck to the arbitration hearing, worked to Schoonover's detriment.

The panel majority's decision, exposing such tactical judgments to searching, hindsight scrutiny, will undermine grievance arbitration as a final and binding means for resolution of workplace disputes. The decision invites DFR suits by losing grievants that challenge union tactical judgments or claim that additional investigative measures should have been undertaken. It further fosters collateral attacks by allowing losing grievants to circumvent the finality of the arbitration process based on speculation that different tactical judgments could conceivably have worked to their benefit.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted. The decision of the Sixth Circuit should be reversed. The matter should be remanded with the direction that judgment enter on behalf of Local 24.

Respectfully submitted,

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November 4, 1998

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 96-3623/3624/3683

DENNIS W. SCHOONOVER
(96-3623),
Plaintiff-Appellee/
Cross-Appellant,

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE (96-3624) and LOCAL 24, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA (96-3683),
Defendants-Appellants/
Cross-Appellees.

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland
No. 88-01447—George W. White, Chief District Judge

Argued: February 5, 1998
Decided and Filed: June 19, 1998

OPINION

Before: MERRITT, KENNEDY, and BOGGS, Circuit Judges.

MERRITT, Circuit Judge. In this hybrid lawsuit brought under 301 of the Labor Management Relations Act, 29 U.S.C. 185, Defendants Consolidated Freightways Corporation and Teamsters Local 24 challenge the sufficiency of the evidence supporting a $850,000 jury verdict for Plaintiff Dennis Schoonover. This is a fact-intensive case in which the applicable legal standards are well settled. The basis for the defendants' appeal is that the District Court erroneously denied their motions for judgment as a matter of law. In a separate appeal, Schoonover contends the District Court improperly prevented him from presenting expert testimony on rebuttal as well as proof of pain, suffering, and punitive damages. Because the record contains ample evidence to support liability under 301, we affirm the jury's verdict against the defendants. We also conclude the District Court's evidentiary decisions were within its discretion and therefore reject Schoonover's assignments of error.

Dennis Schoonover was a truck driver for Consolidated. He was discharged for intentionally destroying company property, specifically the brake pedal of the tractor he was driving to Milwaukee. On the day in question, the pedal broke off within twenty-five minutes of Schoonover's departure from the terminal. Consolidated claimed that Schoonover broke the pedal in retaliation against his supervisors for making him drive a "piece of junk." His supervisors believed that he had used a long tire iron (or "bud bar") to pry the pedal off so that he could drive a different rig to Milwaukee. They reached this conclusion by prying the pedal off another tractor in this manner. Schoonover, on the other hand, vehemently denied breaking the pedal. According to him, when he went to put on the brakes at the first major intersection on his route, the pedal was lying on the floorboard in two pieces. This story was corroborated by another truck driver who saw

Schoonover perform an emergency stop at this intersection, which would be consistent with a normal brake failure. Schoonover speculated that the brake tie-down mechanism, which holds the pedal down while the driver checks the brake system, could have caused the pedal to break. Purportedly, the tie-down could have lodged under the pedal, causing it to snap off when a driver depressed the brake, or it may have caused cracks in the die-cast metal by repeatedly allowing the pedal to snap back into place after a driver disengaged it.

After a hearing, Consolidated fired Schoonover for "blatant and intentional abuse of company equipment." The union subsequently filed a grievance on Schoonover's behalf. Pursuant to the collective bargaining agreement between the Teamsters and Consolidated, the case went to arbitration before the Ohio State Grievance Committee. Although Consolidated presented expert testimony from a metallurgist who testified that the pedal was broken by upward pressure, Schoonover's union representatives chose not to rebut this evidence with their own expert testimony. The arbitration committee denied Schoonover's grievance and sustained his discharge.

Schoonover then filed this federal lawsuit against Consolidated for violating the collective bargaining agreement and Teamsters Local 24 for breaching its duty of fair representation. The case went to trial. At the close of Schoonover's case the District Court granted the defendants' motion for judgment as a matter of law on grounds that the complaint was time-barred. This Court reversed, holding that the six-month statute of limitations for hybrid 301 actions did not begin to run until the arbitration panel's decision was reduced to writing. Schoonover v. Consolidated Freightways Corp. of Delaware, 49 F.3d 219 (6th Cir. 1995). The case then proceeded to a second trial upon remand. At the conclusion of all the evidence, the defendants again moved for judgment as a matter of law, arguing Schoonover had failed to establish a prima facie case. The District Court denied the motion.

The jury returned a verdict in favor of Schoonover and awarded him $850,000 in damages, finding Consolidated liable for 65 percent of the damages and the Teamsters Local for 35 percent. The defendants both renewed their motions for judgment as a matter of law, which the District Court also denied in a brief written opinion. The defendants' appeal challenges the District Court's denial of their motions for judgment as a matter of law before and after the verdict.

In order to overturn the jury's verdict on grounds that the District Court improperly denied them judgment as a matter of law, the defendants must show the evidence against Schoonover was so overwhelming that no one could reasonably find in his favor. Black v. Ryder/P.I.E. Nationwide, Inc., 970 F.2d 1461, 1470 (6th Cir. 1992). In other words, unless this Court "is left with the definite and firm conviction that a mistake resulting in plain injustice has been committed," or unless the verdict "is contrary to all reason," we must affirm the jury's verdict. Id. On review, this Court cannot weigh the evidence, determine credibility, or substitute its judgment for that of the jury. Instead, we must view the evidence and all reasonable inferences in Schoonover's favor. Id.

At trial, Schoonover presented evidence which, if believed, suggested that his supervisors at Consolidated set him up and then fabricated evidence to assure his dismissal. He testified that prior to his incident one of his supervisors had threatened him, precipitating a number of unfounded warning letters against him. This served as the background to what Schoonover depicted as a concerted effort by his superiors to run him off. The evidence indicated that his supervisors were convinced he had broken the pedal out of spite and thus went in search of ways to confirm their suspicions. A number of witnesses testified that when the company reenacted the incident for the union, a supervisor had doctored the pedal to make it look like Schoonover could have easily broken

the pedal with a bud bar in the short time he was gone from the terminal. In fact, Schoonover's attorney played the jury a videotape he stumbled upon in discovery, which showed several Consolidated representatives struggling for over two hours to break an identical pedal. Apparently these representatives discovered that the die-cast metal pedal could only be broken with the leverage provided by a wooden block, which Schoonover did not have in his cab. Moreover, although the testimony of Consolidated metallurgist appeared invulnerable at the arbitration hearing, the trial disclosed that Consolidated had only asked the expert to determine the direction of the break, not its possible causes. Consolidated's own expert admitted at trial that the pedal could have broken either from a prying force applied from above or from an object, such as the tie-down mechanism, lodged underneath. In addition, Schoonover's expert metallurgist presented trial testimony that the pedal contained structural defects which the company's expert had overlooked.

Schoonover also presented evidence suggesting that the union never took his grievance seriously and thus provided him inadequate representation at his grievance committee hearing. His theory of the case was that after Consolidated presented its doctored reenactment of the incident to the union, his union representatives gave up on his grievance. One of the union officials involved in the investigation testified that the reenactment was so convincing that the union never confirmed the company's version of events or even tried to pry a pedal off with a bud bar. Although his union delegates knew that the company had hired a metallurgist to provide expert testimony on the decisive issue at the hearing, they did not hire their own expert or even interview the company's expert. In fact, Schoonover's representative at his discharge hearing testified that cases involving destruction of company property are the hardest to resolve and often turn on expert testimony. This representative also admitted that the union could and should have brought a truck to

the hearing to show the arbitrators how difficult it is to actually break a pedal with a bud bar. Furthermore, Schoonover showed that he provided the union with a list of drivers who had experienced similar incidents, but the union did not pursue these leads when it learned the incidents occurred in tractors made by a different manufacturer. Two of these drivers provided trial testimony that the die-cast metal pedals in their trucks were similar to the one in Schoonover's truck and that the metal had either cracked or broken in half. Ultimately, the court admitted substantial evidence suggesting the union's representation of Schoonover at the arbitration hearing was perfunctory. Testimony revealed that the union only met with Schoonover once the Sunday before the hearing, that its presentation at the hearing only lasted fifteen minutes, and that its representatives apparently made little effort to rebut the company's evidence. This apparently left Schoonover to ask the grievance committee merely to believe his side of the story.

After weighing this evidence, the jury found that Consolidated breached the collective bargaining agreement and that the Teamsters Local breached its duty of fair representation. In a special verdict, the jury found Consolidated's termination of Schoonover was a breach of its contract with the union. Further, the jury determined the Teamsters Local breached its duty of fair representation to Schoonover in the grievance and arbitration procedures. Finally, the jury decided the union's breach tainted the hearing in such a way that the arbitration committee would have reached a different result without the breach. These findings specifically trace the requirements for liability in a hybrid 301 case. See Black v. Ryder/P.I.E. Nationwide, Inc., 15 F.3d 573, 585 (6th Cir. 1994). On the defendants' requests for postjudgment relief, the District Court concluded the evidence was sufficient and found the jury's verdict reasonable.

Viewing the evidence in the light most favorable to Schoonover, we believe the jury's verdict was is not "con-

trary to all reason" or based on a "mistake resulting in plain injustice." See Black, 970 F.2d at 1470. In hybrid 301 cases, the focus is on "whether . . . the employer breached the contract and whether there is substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings." Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 568 (1976). This jury could have reasonably concluded that Consolidated breached the contract when its employees doctored the pedal they used to reenact the incident for the union. The videotape, showing that the pedal was not as easy to break as Consolidated made it appear, was strong circumstantial evidence for Schoonover's theory that his supervisors set him up. The jury could have also found that the Teamsters Local breached its duty of fair representation to Schoonover in the way it handled his grievance. Refusing to call a metallurgist when the union representatives knew such testimony was crucial; failing to investigate similar incidents involving broken pedals, when that evidence could have convinced the arbitrators that Schoonover's incident was not as unusual as it appeared; crediting Consolidated's reenactment of the incident, when an independent investigation would have revealed that Schoonover could not have broken the pedal with only a bud bar in the short time he was gone from the terminal; and neglecting to bring a truck to the hearing, when its presence would have allowed the grievance committee to test the company's version of the facts for themselves, are all substantial reasons which, in combination, would justify the jury's finding that the union's representation of Schoonover was "arbitrary, discriminatory, perfunctory, or in bad faith." Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1355 (6th Cir. 1989); see also Vaca v. Sipes, 386 U.S. 171, 190 (1967). Without these mistakes, it is certainly conceivable that the grievance committee would have decided Schoonover's grievance differently.

Our review of the record has failed to produce any definite or firm conviction that the defendants have suf-

fered any injustice from the verdict. This record contains ample evidence from which the jury could have concluded that Consolidated breached the collective bargaining agreement, that the Teamsters Local breached its duty of fair representation, and that this breach tainted the outcome of the hearing before the grievance committee. We conclude the evidence sufficiently supports liability in a hybrid 301 case, see Black, 15 F.3d at 585, and therefore affirm the jury's verdict. As for Schoonover's cross-appeal of the decision to exclude his expert's testimony on rebuttal and his evidence of punitive damages, we conclude the District Court acted within its discretion. See Benedict v. United States, 822 F.2d 1426, 1428-29 (6th Cir. 1987); Wilson v. Int'l Bhd. of Teamsters, 83 F.3d 747, 754-55 (6th Cir. 1996). Accordingly, the judgment of the District Court is affirmed.

DISSENT

KENNEDY, Circuit Judge, dissenting. Because the evidence, even in the light most favorable to plaintiff, does not permit a finding that the Union acted "in such a discriminatory, dishonest, arbitrary or perfunctory fashion as to breach its duty of fair representation," the standard set in DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 164 (1983), I respectfully dissent.

There are three distinct ways in which a union can breach the duty of fair representation: by taking actions that are arbitrary, discriminatory or in bad faith. Black v. Ryder/P.I.E. Nationwide, Inc., 15 F.3d 573, 584 (6th Cir. 1994). Negligence fails to satisfy any prong of this tripartite standard. Dushaw v. Roadway Express, Inc., 66 F.3d 129, 133 n.1 (6th Cir. 1995) (citing United Steelworkers of America v. Rawson, 495 U.S. 362, 372-73 (1990)). A plaintiff seeking to establish a union's breach of the duty of fair representation is met with an "onerous burden." Black, 15 F.3d at 585. A union's action will be found arbitrary only if "the union's behavior is so far outside a 'wide range of reasonableness' . . . as to be irrational." Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 67 (1991).[1] A plaintiff also must show that any breach more likely than not tainted the grievance procedure, substantially affecting the outcome. Dushaw, 66 F.3d at 132 (citing Black, 15 F.3d at 585). The record reflects that the Union investigated the brake pedal incident; followed leads as to other brake pedal fractures; interviewed and took the statement of the only

[1] Plaintiff argues that O'Neill's "wholly irrational" standard is inapplicable to grievance proceedings because O'Neill involved contract negotiations. We rejected this argument in Walk v. P*I*E* Nationwide, Inc., 958 F.2d 1323, 1326 (6th Cir. 1992). (O'Neill's standards apply to both contract negotiations and grievance proceedings).

eyewitness to the incident; and pursued, considered and tested theories consistent with plaintiff's denial that he did not intentionally break the pedal.

The majority finds that without the mistakes which the union representative made, the jury could find that the grievance committee would have decided Schoonover's grievance differently. If the Union were held to a negligence or a malpractice standard, I would agree. But union representatives are not lawyers. They do not have the advantage of discovery procedures. At most, the Union's failures were negligence or bad judgment, neither of which is enough to constitute the breach of duty of fair representation. Walk v. P*I*E Nationwide, Inc., 958 F.2d 1323, 1326 (6th Cir. 1992) ("[S]imple negligence or mere errors in judgment will not suffice.")

The majority points to four deficiencies in the Union's handling of the grievance to support the jury's verdict. First, the Union's failure to have the pedal examined by a metallurgist. The Union made what could now appear to be the erroneous decision to refrain from hiring its own expert to discern how the pedal was broken. The Union had had two prior experiences in which consulting an expert had worked to the detriment of an employee. The Union could not secretly examine the pedal. The Union decided to base its position at the grievance proceeding on plaintiffs' denial and to argue that Consolidated could not prove plaintiff intentionally fractured the brake pedal. The Union's decision may well have been a mistake but it was neither perfunctory nor arbitrary. It was based on prior unsatisfactory experiences with experts. The expert's report merely stated that the fracture was caused by an upward force, a conclusion with which both experts at trial agreed. The decision not to have the brake pedal examined by a metallurgist cannot be said to be outside the range of reasonableness.

The second reason given by the majority is "failing to investigate similar incidents." Plaintiff provided the Union

with information about incidents in other locations where brake pedals failed. The Union contacted local union presidents in those locations as well as various drivers. It learned that the failures were in Freightliner trucks, which have different brake systems and were due primarily to flaws in floorboard and pedal mountings.[2] Even with all the discovery, the trial did not produce similar incidents.

Third, the majority states that the Union should not have credited Consolidated's re-enactment of the incident, but should have made an independent investigation; that is, tried to break a pedal with a bud bar itself. While in hindsight that should have been done, the union representatives had observed Sarne break a similar pedal with a bud bar. While this was not the first time Sarne had tried to break a pedal and he had had trouble breaking one until he learned where to put the bud bar, he broke this one on his first attempt in the union representative's presence. While they were unaware of his earlier practice attempts, still he did break it with ease. The union representatives had tried, without success, to see if the tie back bar could cause the pedal to break. While the Union might have established that it was difficult to break the pedal with a bud bar, there is no suggestion in the record that it cannot be done. The Union did not have the ready access to trucks for destructive tests that the employer did. It did not own trucks on which it could experiment at will.

Finally, the majority finds the Union breached its duty of fair representation by not bringing a truck to the hearing where the grievance committee could test the com-

[2] Had the Union investigated Navistar brake failures further, it would have learned that Navistar had no record of any similar fracture problem with any other international pedals. While plaintiff at trial produced evidence of other brake failures, he produced no evidence of any other similar failure of an International pedal.

pany's version of the facts. In the earlier demonstration, the union representatives had observed a bud bar break the pedal. Whether to permit the grievance committee to conduct its own experiment or not seems to me to be a judgment call well within a wide range of reasonableness. The grievance committee members were all familiar with trucks.

Because the record does not support the jury's verdict that Local 24 acted arbitrarily, discriminatorily or in bad faith, and outside "a wide range of reasonableness," I believe the District Court erred in not granting the Union's motion for judgment as a matter of law.

APPENDIX B

[Filed Aug. 7, 1998]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

96-3623/3624/3683

DENNIS W. SCHOONOVER,
(96-3623),
Plaintiff-Appellee,
v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE (96-3624) and LOCAL 24, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA (96-3683),
Defendants-Appellants.

ORDER

BEFORE: MERRITT, KENNEDY, and BOGGS, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes the issues raised in the petitions were

fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied. Judge Kennedy would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX C

[Filed May 3, 1996]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C88-1447A
HON. GEORGE W. WHITE

DENNIS W. SCHOONOVER,
Plaintiff,

vs.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, *et al.*,
Defendants.

MEMORANDUM AND ORDER

This matter is before the Court upon the Motions for Judgment Notwithstanding the Verdict submitted by defendants, Consolidated Freightways (Dkt. #239) and Teamster Local No. 24 (Dkt. # 238). On February 23, 1996, a jury returned a verdict in favor of plaintiff, Dennis Schoonover, on his hybrid Section 301/Duty of Fair Representation claim.[1] Specifically, the jury found Consolidated violated the collective bargaining agreement; the union breached its duty of fair representation; and the union's representation of plaintiff had the probable effect of causing an erroneous outcome at the arbitration stage. *See* Jury Interrogatories (Dkt. #236).

---

[1] Plaintiff's action arises under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 301.

The Sixth Circuit has stated that:

> The issue raised by a motion for a judgment notwithstanding the verdict is whether there is sufficient evidence to raise a question of fact for the jury. In determining whether the evidence is sufficient, the trial court may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor. If, after thus viewing the evidence, the trial court is of the opinion that it points so strongly in favor of the movant that reasonable minds could not come to a different conclusion, then the motion should be granted.

Ratliff v. Wellington Exempted Village Schools Bd. of Ed., 820 F.2d 792, 795 (6th Cir. 1987) (citing *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104-05 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979)).

This Court finds that the evidence was sufficient to raise a question of fact for the jury. Viewing the evidence presented at trial in a light most favorable to plaintiff, including the testimony concerning the matter in which the pedal could have broken and the conflicting testimony regarding Local No. 24's handling of the arbitration, the Court does not find the jury verdict to be unreasonable.

Moreover, defendants' argument that plaintiff's claims are barred by the applicable six month statute of limitations is without merit. The Sixth Circuit rendered an opinion on May 30, 1995 concerning this exact issue. *Schoonover v. Consolidated Freightways Corp. of Delaware, et al.*, No. 93-4147 (6th Cir. 1995). Although defendants assert that the subsequent trial has produced substantially different evidence such that the circuit court's ruling should no longer apply, this Court does not agree.

The Court finds that the evidence presented at trial did not alter the circuit court's underlying judgment.

Accordingly, defendants' Motions for Judgment Notwithstanding the Verdict are hereby *denied*.

IT IS SO ORDERED.

/s/ George W. White
GEORGE W. WHITE
Chief Judge
United States District Court

Supreme Court, U.S.
FILED
JAN 19 1999
CLERK

Nos. 98-744 and 98-773

In the

Supreme Court of the United States

October Term, 1998

Consolidated Freightways Corporation
of Delaware, Inc., and International
Brotherhood of Teamsters, Local 24,
Petitioners,

v.

Dennis W. Schoonover,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

MEMORANDUM IN OPPOSITION

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January 19, 1999

QUESTIONS PRESENTED

1. Did the Court of Appeals apply the proper rule of law in reviewing the verdict of a jury that was properly instructed that the standard of liability for breach of the duty of fair representation was whether the union's conduct was arbitrary, discriminatory or in bad faith, and whether the breach tainted the outcome of the arbitration proceeding?

2. Does the statute of limitations for a hybrid suit for breach of fair representation and violation of the collective bargaining agreement begin to run before the arbitral body issues its decision, as soon as it states what the result of the hearing is going to be?

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MEMORANDUM IN OPPOSITION

Petitioners here seek review of an appellate decision that upheld the verdict of a properly instructed jury that found petitioners liable for breach of the duty of fair representation {"DFR") and breach of contract, respectively. Petitioners do not take issue with the jury instructions, and they did not take issue with them below. Thus, the court of appeals properly framed the issue: "This is a fact-intensive case in which the applicable legal standards are well settled." Pet. App. 2a. The court below recognized the single issue presented and noted that Petitioner's "challenge the sufficiency of the evidence supporting" the jury's verdict, Pet.App.2a., in which the only issue is whether "the evidence against Schoonover was so overwhelming that no one could reasonably find in his favor." Id. 4a.

Rather than taking issue with the standard of law applied pursuant to the jury instructions, petitioners attack the opinion below because of the use of the word "could" by the Sixth Circuit. In fact, however, the Court was simply pointing out what a reasonable jury could have properly concluded in light of the correct viewing of the factual record. That is, a jury could properly have found facts amounting to a breach under well-settled standards of law. Each and every passage in the court of appeals' opinion that petitioners' cite as supposedly being in conflict with the decisions of other courts of appeals did not in fact cite some controversial legal standard, but simply indicated that the jury could have relied on a particular fact, among others, and could properly have come to a particular conclusion, in finding a breach of DFR or contract. Thus, the questions on which petitioners ask the Court to grant certiorari simply are not presented here.

In order to see why this is so, we begin by recounting the facts, not in the light most favorable to the union and

employer as the petitions do, but as they were presented to the jury, on which their verdict was based. We then show how the court of appeals analyzed the record and the jury verdict, and why it affirmed. Finally, we demonstrate, in light of this Statement, that the questions are not properly presented, that the supposed conflict among the circuits does not exist, and that certiorari should, consequently, be denied.

STATEMENT

A. Facts

Respondent Dennis Schoonover was employed by Consolidated Freightways ("CF"), the petitioner in No. 98-773. from 1970 until his was discharged in 1987. As recounted by the court of appeals, the circumstances of respondent's discharge were as follows:

> [Respondent] was a truck driver for [Petitioner]. He was discharged for intentionally destroying company property, specifically a brake pedal of the tractor he was driving to Milwaukee. On the day in question, the pedal broke off within twenty-five minutes of [Respondent's] departure from the terminal. [Petitioner] claimed that [Respondent] broke the pedal in retaliation against his supervisors for making him drive a "piece of junk." His supervisor believed that he had use a long tire iron (or "bud bar") to pry the pedal off so that he could drive a different rig to Milwaukee. They reached this conclusion by prying the pedal off another tractor in this manner. [Respondent], of the other hand, vehemently denied breaking the pedal. According to him, when he went to put on the brakes at the first major intersection on his route, the pedal

> was lying on the floorboard in two pieces. This story was corroborated by another truck driver who saw [Respondent] perform an emergency stop at this intersection, which would be consistent with a normal brake failure. [Respondent] speculated that the brake tie-down mechanism, which holds the pedal down while the driver checks the brake system, could have caused the pedal to break. Purportedly, the tie-down could have lodged under the pedal, causing it to snap off when a driver depressed the brake, or it may have caused cracks in the die-cast metal by repeatedly allowing the pedal to snap back into place after a drive disengaged it.
>
> Petition for Writ of Certiorari, Appendix A, 2a-3a.

Respondent filed a grievance over his discharge with his collective bargaining representative, Teamsters Local 24, which is the petitioner in No. 98-744. In order to dissuade Local 24 from pursuing respondent's grievance, CF gave Local 24 the report of an expert that purported to support the discharge, and conducted a demonstration that purported to show how respondent must have intentionally broken the pedal in order to hurt CF's business. At trial, however, respondent was able to demonstrate that the expert had been asked only to give an opinion about whether the pedal was broken by upward force which, the employer later argued, could have resulted from an alleged crow bar, but that the expert was steered away from conducting tests that he had suggested that could have demonstrated, among other things, weakness in the pedal, because that would have undercut the discharge; he also showed that the demonstration was phony. Respondent proved that CF was able to break the pedal only by installing **different** equipment than that which was on respondent's truck.

Additionally, a videotape obtained from CF in discovery showed that CF supervisors had tried for two straight hours to break the pedal in the way in which respondent was supposed to have done, but had been completely unable to do it, until they hit on the trick of using different equipment. Respondent also established at trial that the cost of fixing the brake pedal was only a few dollars, undercutting CF's theory that respondent broke it in order to get back at the company for some imagined slight.

As against petitioner Local 24, the theory of respondent's case was that the union simply accepted the employer's story and rejected respondent's story without much thought and without investigation, and then proceeded to do no more than go through the perfunctory motions in presenting respondent's case in arbitration. In this regard, it is important to note that this is **not** a case in which a union made a deliberate decision not to proceed with a grievance, and defends its decision in that regard on the basis of a reasoned analysis of the case. Rather, in this case the union took the case before a union-employer joint committee but did no more than permit the respondent to say he didn't do it and leave it to the committee to decide what to believe.

Reading the petitions, one would think that respondent's claim was simply that the union decided not to hire an expert to examine the accident and determine whether respondent could possibly not have been at fault. In fact, however, this was but one of numerous deficiencies in the union's handling of the grievance to which respondent pointed in arguing that the union pursued his grievance in a grudging, perfunctory fashion. Among these flaws were the following:

-— the union did not even talk to CF's expert; had

it done so, even a telephone call would have revealed that CF directed its expert not to consider possible causes of the accident that would have exonerated respondent, even though he suggested such causes to CF;

-— the union made no effort to confirm the company's version of the facts by conducting its own demonstrations with the brake pedal; had it done so it would have learned that it was virtually impossible for the pedal to have broken in the way that CF had accused respondent of doing;

— the union made no demand on CF for relevant materials, as it had the power to do;

-— the union allowed the employer to use a brake pedal from a different kind of truck as a model at the hearing;

— the union made no effort to determine the accuracy of the company's claim that the truck's manufacturer had no reports of similar fractures; had it done so it would have learned that the manufacturer doesn't keep records in a manner that shows whether brake pedals fractured, but that a more general category of "brake replacements" had numerous entries, without showing the reasons for the replacement;

— the union did not consider or present evidence about problems caused by the specific variant of brake pedal used on respondent's truck, even though the truck which was from a different manufacturer than most of CF's trucks, and the pedal type and accompanying equipment were different that most of that manufacturer's trucks;

-— the union did not talk to or present evidence from other drivers identified by respondent who knew that similar pedals owned by the company unintentionally fractured in the same manner as Schoonover's; these drivers' trial testimony was devastating to the company's claim of

just cause for the discharge;

— the union did not investigate structural defects in the actual broken pedal;

— the union did not investigate or question the effect of a tie down mechanism used exclusively by CF and which their own expert testified could have been a cause of the break in Schoonover's pedal;

-— and numerous other errors, the discussion of which consumed 14 pages in respondent's brief in the court of appeals (a copy has been lodged with the Clerk).

The grievance was presented to a joint union-employer committee on November 18, 1987. The employer's representative presented numerous documents, laboratory reports, and statements from employees and other witnesses, and conducted a demonstration using a "mock-up" brake pedal (from a different truck manufacturer, as noted above but ignored at the arbitration). The union's case consisted of reading statements from respondent and the miswritten statement of another driver, oral statements by respondent, plus the complaint that the company's expert testimony should be disregarded because the union did not have any experts. After a short recess, the chairman of the committee indicated that the committee was not going to grant the grievance, and that an official notification would be sent to the parties reciting the committee's findings. Indeed, the committee's rules specifically provide that decisions must be issued in writing. On November 24, 1987, respondent learned from petitioner Local 24 that this official denial of the grievance had been issued.

B. Proceedings Below.

Respondent filed his complaint in the United States District Court for the Northern District of Ohio on May 20,

1988, which was more than six months after November 18, 1987, but less than six months after November 24, 1987. At the conclusion of respondent's case at his first trial in December 1992, the district court dismissed the action as untimely, applying the six-month statute of limitations adopted by this Court in *DelCostello v. Teamsters*, 462 U.S. 151 (1983).

Respondent appealed, contending that, just as he could not have filed his hybrid claim before receiving a copy of the joint committee decision rejecting his grievance, so did the statute of limitations not begin to run until that time. The court of appeals agreed, in a unanimous opinion authored by Circuit Judge Boggs. It began by noting the unanimity among the circuits in holding that a cause of action accrues when suit could first have been maintained, and that a plaintiff cannot bring a hybrid suit until both of the following have occurred — the arbitration decision has been issued, and the plaintiff learns (or should have learned) of the decision. CF Pet. App. 15a-16a. The question, therefore, is whether an oral indication of the intended decision is the "decision" for statute of limitations purposes, or whether the decision is not issued until it is written. Looking both to the rules of the Teamster joint committee in question, and the Ohio arbitration statute, which is based on the Uniform Arbitration Act, the court concluded that to be official an arbitration award must be in writing. *Id.* *17a-18a.* Moreover, given the need for a written record of the basis for decision, in order to be able to litigate a DFR case (or any other case challenging an arbitral determination), the court concluded that the only correct approach was to expect litigants to wait for the written decision before coming to court. *Id.* 18a-19a. Accordingly, respondent had properly sued within six months of the written decision, and the timeliness dismissal was reversed.

Rather than seeking review of this decision, petitioners

returned to the district court and the case proceeded to trial. With respect to the DFR, the jury was instructed that it could find a breach only if petitioner Local 24's "conduct in representing Schoonover was arbitrary, discriminatory or in bad faith." The court specifically instructed that "simple negligence by the Union or errors in judgment" were not sufficient to breach the DFR, but that arbitrary conduct could be found "if . . . the union's behavior is so far outside a wide range of reasonableness as to be irrational," or if "a union handles a grievance in a perfunctory manner with caprice or without rational explanation." The instructions further directed that liability could be found only if petitioner Local 24's failure to fairly represent "was of such a character as to have had the probable result of causing an erroneous outcome at the arbitration stage," or, in other words, that "the Union's breach of its [DFR] tainted and undermined the arbitration process; thereby foreclosing the Plaintiff from a fair consideration of his grievance by the arbitrators." In other words, the trial judge instructed, respondent "must demonstrate by a preponderance of the evidence that the Union's breach was so significant that the grievance process was seriously flawed and the arbitration decision tainted, such that a different result would have been rendered but for the Union's arbitrary, discriminatory or bad faith actions." Thus, indisputably correctly, instructed, the jury rendered a verdict for respondent.

Petitioners then appealed. The appellate briefs, on both sides, were devoted largely to an analysis of the record, with petitioners, presenting the facts in a light most favorable to the petitioners just as they do in their petitions in this Court, contending that there was not sufficient evidence in the record to sustain the verdict on the questions of whether the union had breached its DFR and whether the union's breach had tainted the outcome of the joint committee's deliberations, and

respondent arguing just as forcefully that there was ample evidence to support the verdict in both respects. Petitioners did not contend below that the trial court had committed any error of law or given any faulty jury instructions, apart from its failure to appreciate that there simply wasn't enough evidence to sustain the verdict. Their questions presented were all directed to the question of whether the record was adequate to sustain the verdict.

In an opinion by Circuit Judge Merritt, joined by Circuit Judge Boggs, The court of appeals upheld the verdict in all respects. Like the parties, the court below did not treat the case as one presenting difficult of controversial questions of law; instead, it said, the petitioners "challenge the sufficiency of the evidence supporting" the jury's verdict, Pet App. 2a, in which the only issue was whether "the evidence against Schoonover was so overwhelming that no one could reasonably find in his favor." *Id.* 4a. In order to decide that question, it recounted the various forms of evidence that Schoonover had presented to show "that his supervisors . . . set him up and then fabricated evidence to assure his dismissal," *id.* 4a-5a, and "that the union never took his grievance seriously and thus provided him inadequate representation at his grievance committee hearing." *Id.* 5a-6a. The jury's findings by special verdict that petitioner CF has breached its contract, that petitioner Local had breached its DFR, and that this breach "tainted the hearing in such a way that the arbitration committee would have reached a different result without the breach, . . . specifically trace the requirements for liability in a hybrid 301 case." *Id.* 6a.

The court then concluded that the evidence was sufficient to support findings on each of these questions. The court recounted several failings by petitioner union which, cumulatively, "would justify the jury's finding that the union's

representation of Schoonover was 'arbitrary, discriminatory, perfunctory, or in bad faith," and that without these failings, "it is certainly conceivable that the grievance committee would have **decided** Schoonover's grievance differently." *Id.* 7a. Given the high standard for overturning a jury verdict, these conclusions required affirmance.

Judge Kennedy dissented, but like the majority she treated the case as a factual one and not a legal one. She did not accuse the majority of committing any errors of law, not to speak of departing from the precedents of other circuits or of this court. She simply concluded that there was not sufficient evidence in the record to sustain the verdict.

Petitioners then sought rehearing and rehearing en banc, but no judge requested a vote on en banc consideration.

REASONS FOR DENYING THE WRIT

The Decision Below Does Not Conflict With Any Decision of This Court or Any Other Circuit, and Indeed the Passages That Allegedly Reflect Legal Error Are Simply Taken out of the Context of Finding No Error in a Jury Verdict

Between them, the two petitioners ask the Court to grant certiorari in this case on three separate questions of law that are said to be presented here. Both petitioners contend that the Sixth Circuit applied the wrong standard of union culpability for the finding a DFR breach, charging that the court below accepted a "negligence" or "legal malpractice" standard. In addition, the union petitioner charges the court with allowing a finding of liability based only on a mere **possibility** that the DFR breach tainted the arbitral outcome, and the employer petitioner

contends that the suit was untimely because it was brought less than six months after the written decision but more than six months after the oral announcement of which the decision would be.

As we explain below, of these three questions, only the latter is genuinely presented. The court did not apply a negligence standard, but upheld the verdict based on the perfunctory processing of the grievance (that is, that the union was only going through the motions), and it did not uphold a standard of "possible taint" but simply said that the evidence was enough that taint could have been found. In short, the offending lines on which petitioners seize are simply taken out of context. The legal questions that petitioners' able counsel endeavor to create out of a substantial evidence appeal simply are not presented here. The limitations question is here, but the holding below is not in conflict with other lower court holdings or with any decision of this Court, and indeed, it is undoubtedly correct and thus not worthy of a grant of certiorari.

1. Both petitioners contend that the court below held the union to a standard of simple negligence as a sufficient basis for finding a breach of the DFR. That is simply not what happened below. The Sixth Circuit at no time mentions the word negligence or in any way suggests a negligence standard should be used. To the contrary, the Court relied on the the correct standard for the union breach as the DFR, traditionally followed in the Sixth circuit and elsewhere, which is whether the representation "was 'arbitrary, discriminatory, perfunctory, or in bad faith.' *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1355 (6th Circuit 1989); See also *Vaca v. Sipes*, 386 U.S. 171, 190, (1967)." Pet. App. 7a. The jury in this case was properly instructed on the "arbitrary, discriminatory or bad faith" standard enunciated by this Court in many cases beginning with

Vaca v. Sipes, 386 U.S. 171 (1967). The instructions included two explanations of the "arbitrary" portion of the standard -- (1) that "arbitrary" could include merely "perfunctory" grievance handling that amounts to merely going through the motions of processing the grievance without ever taking the matter seriously, *Vaca, supra*, 386 U.S. at 190, 191, and (2) that conduct so far beyond the bounds of reasonableness as to be irrational is arbitrary. *ALPA v. O'Neill*, 499 U.S. 65 (1991).

Each of the two petitioners relies on a different part of the court of appeals' decision to show that it relied on a negligence standard. Petitioner CF relies solely on the dissent for the proposition that a negligence standard was applied below. Thus, in the argument portion of its brief, this petitioner states, "The dissent . . . fairly stated the facts and rationally analyzed the evidence in concluding that, at the very most, Local 24's conduct was negligent." CF Pet. 13. But the majority did not invoke a negligence standard, and even Judge Kennedy did not accuse the majority of invoking such a standard; she simply expressed her opinion that the evidence was sufficient only to support a finding of negligence and that this was not legally sufficient. Absent reliance by the majority on a negligence or malpractice standard, certiorari should not be granted to decide whether that is the proper standard simply because one of the three judges below thought that that was all the evidence showed.[1]

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[1] At pages 14-15, of its petition, CF also takes the court below to task for using the wrong standard for deciding whether there was enough evidence to support the jury's verdict. Petitioner advances the curious proposition that "the standard for review of a jury verdict is de novo," which it contends that the Sixth Circuit has used in other cases. We do not believe that

Petitioner Local 24, for its part, seizes on the use of the word "mistakes" in the majority opinion to show that the majority "applied what amounts to a legal malpractice standard of negligence," Pet. 7, and then argues that the decision below conflicts with *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1986), which squarely rejects the legal malpractice standard. Pet. 8. But the words "malpractice" and "negligence" do not appear in the majority opinion, and, indeed, the jury was instructed that mere negligence or errors of judgment were not enough to warrant liability. The offending sentence on which the Local 24 petition relies is the following: "Without these mistakes, it is certainly conceivable that the grievance committee would have decided Schoonover's grievance differently." Pet. App. 7a. The preceding sentence, however, stated that Schoonover's challenges to the union's conduct "are all substantial reasons which, in combination, would justify the jury's finding that the union's representation of Schoonover was 'arbitrary, discriminatory, perfunctory or in bad faith." *Id.* After all, Schoonover's contention, as the majority properly understood it, was that instead of taking his grievance seriously, the local just went through the motions of representing him; that is what the majority found to be supported by the evidence in the record.

Moreover, perfunctory processing of a grievance is precisely what this Court in *Vaca* said a union cannot do. If the union thinks the grievance isn't worth pursuing, it should say so

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this is the Sixth Circuit standard. In any event, the question of the proper standard for review of a jury verdict was not presented to the court of appeals; it is not fairly included in the question presented; and thus it is no basis for a grant of certiorari in this case.

and then its decision stands or falls based on whether its evaluation is so far outside the bounds of reasonableness as to be irrational; but if it takes the case to arbitration, it cannot simply go through the motions. That is the standard on which the jury was instructed — without objection from the respondents — and the Court should not grant certiorari based on the proposition that the court below departed from that standard.

Petitioner Local 24 apparently raises as a separate question whether its "failure to retain an expert" can be "so wholly irrational" as to breach the DFR; according to the union, this is a merely tactical decision in the conduct of a grievance trial that should not be the basis for imposing liability. Pet. 9-10. But Local 24's non-use of an expert was simply one of several defects in its handling of the grievance that supported Schoonover's contention that petitioner was only going through the motions with respect to his grievance. Good lawyers that they are, petitioner's counsel seeks to hold each individual reason up to the light and ask rhetorically whether this reason alone can constitute a breach. But the issue is not whether this individual act breached the DFR, but whether the jury was entitled to find, based on a long series of acts of which this is only one, that petitioner was only going through the motions with respect to his grievance. Indeed the court below referred to the "combination" of "substantial reasons" which "justify the jury's finding." Pet. App. 7a. The court properly held that there was enough evidence to support this aspect of the special verdict, and the question of whether this individual failing breaches the DFR is simply not presented in this case.

2. Petitioner Local 24 also accuses the court below of allowing a jury to find it liable because a breach of the DFR "might have" affected the outcome of the arbitation, instead of

"rigorous proof that taint **actually occurred**." Pet. 11-12 (emphasis in original). Petitioner bases this accusation on the same sentence as its first point: "Without these mistakes, it is certainly conceivable that the grievance committee would have decided Schoonover's grievance differently." Pet. App. 7a. But in this sentence, the court of appeals was not invoking the standard for the jury's consideration of the issue of taint; it was invoking the deferential standard for its review of the jury's special verdict on the issue of taint. The jury was properly instructed that it had to find actual taint; once the jury so found, its verdict had to be upheld so long as there was evidence in the record sufficient to support a finding of taint. That is all the court below meant when it used the words "certainly conceivable," and this question forms no basis for certiorari here.

3. Finally, petitioner CF asks the Court to grant review to decide whether the statute of limitations in a hybrid case accrues when the arbitral body states orally what how it intends to decide the grievance, or only when it issues its written decision and the employee learns of that decision. Petitioner contends that other circuits have held contrary to the decision below, but it does not cite any case that is actually in conflict with the decision below, nor are we aware of any.

Thus, *Samples v. Ryder Truck Lines*, 755 F.2d 881, 887 n.7 (11th Cir. 1985), and *Dowty v. Pioneer World Elec. Co-op.*, 770 F.2d 52, 56 (6th Cir. 1985), the arbitration decisions had in fact been issued in writing. In *Dowty* the court held that the employee's suit was untimely because it was not filed within six months of the date when the written decision was read to him; although he had not received a copy, he knew it had been issued. In *Samples* the decision was favorable to him, but the suit was not filed within six months of the employee's learning

that the union was not going to seek enforcement of the award. The only reference to the time for suing to overturn an arbitration award was in a footnote explaining that the six months runs from the time when the employee learns of the "award" - that is, in context, of the written decision. And *Metz v. Tootsie Roll Industries*, 715 F.2d 299 (7th Cir. 1983), did not involve an arbitration decision at all — the union's breach there was in failing to take the grievance to arbitration, and the court held that the statute began to run when the member knew or should have known of that failing. Thus, petitioner has not cited a single decision of any lower court that conflicts with the decision below — indeed, the petition takes the court below to task for failing to cite any precedent on the issue. But in the absence of any conflict among the lower courts on this issue, there is no reason for the Court to grant review here.

Moreover, the decision below was plainly right. This is true in part because, as the court below noted, the rules of the Ohio Joint State Grievance Committee require decisions to be reduced to writing and signed by both sides. CF Pet. App. 17a. The Ohio arbitration statute, drawn as it is from the Uniform Arbitration Act, requires a written decision. If someone is to challenge an arbitral decision, surely it makes sense to wait to see what the decision says before coming to court, because the text of the decision may affect the viability of the legal challenge.

Petitioner CF seems to suggest that a member suing for breach of the DFR in an arbitration hearing could appeal to the federal courts before the written decision is issued, but that is entirely unlikely. It is as if a federal judge announced that he was going to grant summary judgment for one side or the other, and the losing side filed its notice of appeal before the written summary judgment was issued. Just as the time to appeal does

not begin to run until the written judgment is issued, so the time to sue over breach of the DFR in a grievance proceeding leading to arbitration does not begin to run until the written arbitration decision is issued and member learns of its issuance. The decision of the court below on this point is wholly noncontroversial and not a good reason to grant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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